

Draft Mental Incapacity Bill

Commentary and Explanatory Notes

Making Decisions

Department for Constitutional Affairs – June 2003

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Making Decisions

Presented to Parliament by
the Secretary of State
for Constitutional Affairs – June 2003

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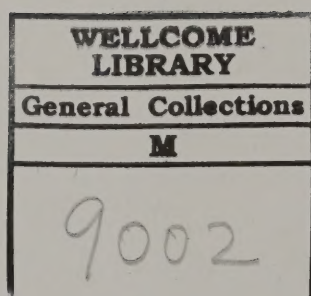
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FOREWORD

Imagine what would happen if you woke up after a car accident and were unable to make any decisions for yourself. Imagine a loved one being diagnosed with dementia and becoming slowly less capable of looking after themselves.

The truth is that most of us do not like to think about these things happening. We take it for granted that we will always be able to make our own decisions in every area of our lives. But what would happen if you were unable to make some of your own decisions? How would you make sure that you were not labelled as completely incapable and denied the opportunity to make the decisions that you could make? How would you ensure that your wishes were respected? Who would take the decisions for you that you could not make yourself, for example, what to have for breakfast, what to do that day, what medical treatment to have, or where to live and how it would be paid for?



The current law on decision making in these situations has grown up in a piecemeal way. Different rules apply in different circumstances. It is difficult to plan ahead for a time when you might lose capacity. Carers, family members and professionals may find that there is insufficient information available to guide them in decision making.

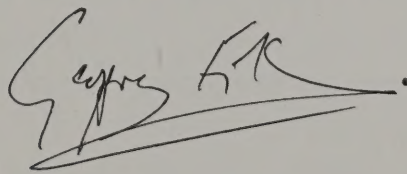
This is the reality for millions of people. It is estimated that over 700,000 people in the UK currently suffer from dementia and this figure is likely to increase to about 840,000 by 2021. Around 145,000 adults in England have severe and profound learning disabilities and at least 1.2 million have a mild to moderate disability. In Wales over 12,000 people were registered as having a learning disability in 2001. At some point in their lives approximately 1 per cent of the UK population will suffer from schizophrenia, 1 per cent will be subject to manic depression and 5 per cent will have serious or clinical depression. All of these people will probably need some decisions to be made on their behalf at some point.

The current law is not as helpful to carers and professionals as it could be. About one adult in seven in the UK cares for another adult – nearly 6 million

carers in all. Many of these people care for adults who lack capacity and they need to make decisions for them. On a daily basis professionals come into contact with adults who lack capacity and they need to know how to go about the decision making process.

We want to improve the lives of all these people and introduce a comprehensive decision making framework for all people who may lack capacity. The Mental Incapacity Bill aims to provide a clear, simple, informal system that will ensure people can maintain a maximum level of autonomy. People would be able to choose someone who can make decisions for them when they cannot do so themselves. And there would be clear rules on how decisions should be taken, making sure that vulnerable people were not left open to abuse.

This Bill will now be scrutinised by a joint Committee of both Houses of Parliament. I shall listen to the debate and results of consultation with interest. This is an extremely important subject, affecting millions of people and I am concerned to ensure we get this Bill right. We need to be confident that it would in reality deliver all the practical benefits that we intend.

A handwritten signature in black ink, appearing to read 'Gordon Filkin', with a long horizontal line extending from the end.

Lord Filkin CBE

Parliamentary-Under-Secretary for the Department for Constitutional Affairs

PART ONE: OUTLINE OF THE DRAFT BILL

Introduction

This draft Bill proposes to reform the law in order to improve and clarify the decision making process for those aged 16 and over who are unable to make decisions for themselves. The Bill is being published in draft to allow for pre-legislative scrutiny to take place by Parliament. Introduction of the Bill into the full legislative procedure will depend on Parliamentary time being available taking account of the outcome of the scrutiny process.

The Bill is the result of several years of consultation and in-depth work. The Law Commission began in 1989 by launching a six-year consultation period on all aspects of mental incapacity. This culminated in 1995 with the publication of their Report and draft Bill *Mental Incapacity*.¹

The Government responded in 1997 with a Green Paper entitled *Who Decides?*² published by the Lord Chancellor's Department. Following a large consultation response to *Who Decides?* the Policy Statement *Making Decisions*³ was published in 1999. *Making Decisions* confirmed the Government's commitment to legislating on issues relating to mental incapacity when Parliamentary time allows. It proposed establishing a comprehensive decision making framework for adults who cannot make their own decisions. *Making Decisions* forms the foundations of this Bill.

Overview

In many cases a high standard of care is already given to people who lack capacity. There are many informal carers and professionals who have built up a body of good practice regarding decision-making on behalf of others who may lack capacity. The Mental Incapacity Bill brings together these principles of best practice with existing common law principles that have been set down over the years.

The Bill introduces new decision making mechanisms to allow welfare and healthcare decisions, as well as financial decisions, to be taken on behalf of persons lacking capacity. It begins by setting out a number of key principles

¹ Law Com 231, published in February 1995

² *Who Decides? Making Decisions on behalf of Mentally Incapacitated Adults*. A consultation paper published in December 1997

³ *Making Decisions. The Government's proposals for making decisions on behalf of mentally incapacitated adults* published in October 1999

and ways in which informal decisions can be lawfully taken on behalf of adults who lack capacity. As these principles are based on existing best practice for the majority of caring decision makers they will bring about no change in how they approach decision making. The Bill then lays out formal decision-making powers that can be acquired or granted.

The decision-making framework established by the Bill will be supported by court based jurisdiction, administration and monitoring authority to ensure that it operates effectively.

The key principles

Lack of capacity relates to each decision to be taken

The Bill lays out a single definition of capacity that requires capacity to be assessed according to each decision that needs to be taken. This means that individuals will not be labelled 'incapable'; rather they would only be regarded as lacking capacity for certain decisions at the time that that decision needed to be taken.

In many cases individuals are quite capable of making some decisions, for example, where they would like to live, but may find other decisions more difficult, perhaps selling the house. The approach to establishing whether someone has capacity used in the Bill is underpinned by the belief that whenever possible individuals should continue to make as many of their own decisions as possible. The starting point is always that the person has capacity and the Bill states that 'all practicable steps' must be taken to help the person make the decision before they can be regarded as lacking the capacity to make that decision.

Best Interests

The concept of acting in the best interests of a person who lacks capacity already exists in the common law. The Bill will enshrine this principle in statute as the overriding principle that must guide all decisions made on behalf of someone lacking capacity. The Bill includes a checklist of factors that decision makers must work their way through when considering what is in the best interests of the person concerned. It will provide a common standard around which all interested parties should discuss and agree how to make a decision for the person who lacks capacity.

The best interests checklist requires the decision maker to consider matters such as whether the person is likely to regain capacity in the future and the need to include the person as far as possible in decision making. Account must be taken of the past and present wishes of the person concerned and the views of other people concerned with the person who lacks capacity.

The decision-making mechanisms

Informal decision making

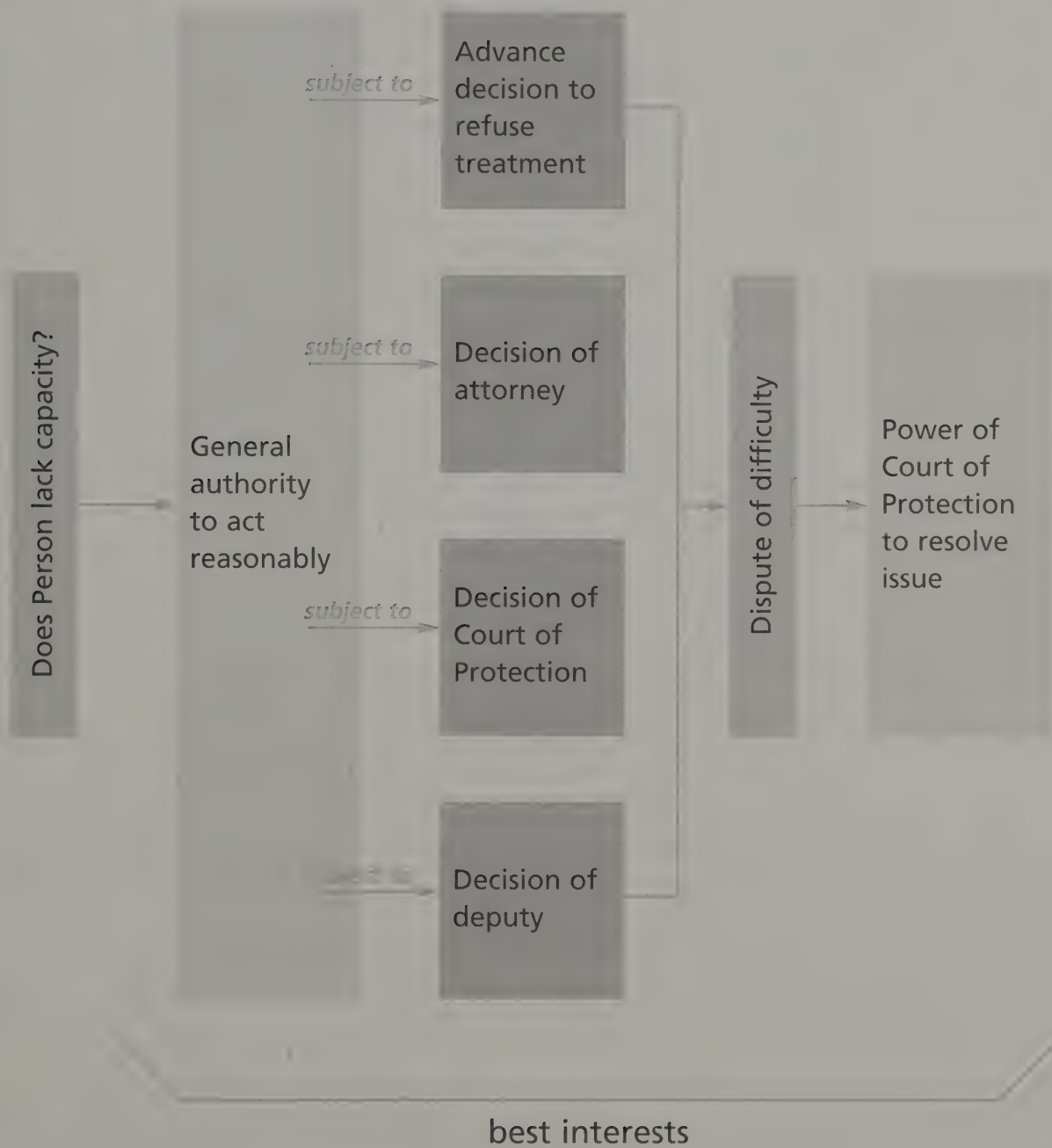
At the moment, the law provides for actions and decisions to be taken on behalf of adults who lack capacity under the common law principle of necessity. However, this is not especially well understood. Some people believe that they can lawfully undertake any action on behalf of a person who lacks capacity. Others believe that unless there is formal authorisation they cannot intervene at all. The Bill will clarify this by setting out a general authority. The general authority makes it lawful to act for someone who lacks capacity where it is reasonable for the person taking the action to do so and the act is in the person's best interests. No formal powers are necessary.

For example: "Amrita's friend and next-door neighbour Jean has suffered from depression for the last ten years. Jean is fine most of the time and perfectly able to look after herself but she does occasionally have episodes where she is quite ill and unable to do basic things for herself although she doesn't need to be treated in hospital. Amrita has always helped Jean through these periods. She cooks her meals, helps her to get up in the morning and uses Jean's money to buy essentials for Jean. Amrita has always been a great help to Jean and Jean doesn't know what she would do without her, indeed Amrita is the main reason why Jean has been able to avoid having to go into hospital."

As Amrita is acting in the best interests of Jean and it is reasonable for her to act in this way, she is undertaking all these actions under the general authority. The Bill will enable both Jean and Amrita to be sure about the circumstances whereby things can be done lawfully on behalf of Jean when she is lacking capacity to do them herself.

The general authority will also be used by medical practitioners to treat patients where no formal decision making mechanisms are in operation. For example, if an adult with a severe learning disability required dental treatment and could not consent to the treatment the dentist could lawfully

Decision-making mechanisms for people who lack capacity



treat the patient. This is if, he reasonably believed that the adult lacked capacity with regard to the particular treatment, it was reasonable for him to treat the adult and he considered the treatment to be in the best interests of the adult after working through the statutory checklist consulting with others interested in the welfare of the adult.

Where financial matters are concerned the general authority makes it lawful to act where reasonable and in the best interests of the person concerned. For example, if Sarah who has suffered from a severe stroke enjoys going to a day centre and needs to take a taxi to get there, it is lawful for the person who orders the taxi to use Sarah's money to pay the taxi fare.

Formal decision making powers

Most of the day to day care of adults who lack capacity will take place under the general authority with no need for any formal decision-making authority. However, in some circumstances it may be better to have a designated decision maker to act on behalf of the person who lacks capacity. The Bill sets out a number of ways in which formal decision-making powers can be acquired or granted. These powers represent an extension to the current ways in which financial decisions can be taken on behalf of others, allowing decisions to be taken on welfare (including healthcare) matters as well.

Lasting Powers of Attorney (LPAs)

The Bill proposes a new system of Lasting Powers of Attorney (LPA) which allow people to appoint an attorney to act on their behalf if they should lose capacity in the future. A Lasting Power of Attorney will be able to apply to welfare (including healthcare) matters as well as financial matters. Thus LPAs are a wider form of the current Enduring Power of Attorney system.

For example, an LPA may be appropriate in the following type of situation:

"Ronald is a widower in his late eighties. He has recently been diagnosed with dementia, a condition which he knows will progress and will eventually cause him to lack a significant amount of mental capacity. Ronald lives with his daughter Gina who will continue to be his principal carer. He knows that Gina will have the best understanding of how his condition will affect him and is concerned that she may not be able to play an appropriate role in how decisions are made on his behalf, particularly concerning healthcare issues. Gina is also concerned that her knowledge of her father's wishes and needs will be overlooked by doctors."

In this situation, while he still has full mental capacity, Ronald could create an LPA. This would mean that he could appoint a person of his choice, such as Gina, to make welfare (including healthcare) and/or financial decisions on his behalf in the event of him losing mental capacity. If Gina were appointed she would be able to take decisions and act for her father in accordance with the best interests test. Gina can then take decisions on behalf of her father when he is not well enough to make them himself. Gina would ultimately have the final say in all the decisions, when her father lacked capacity to make them himself. She would be expected to reach her decision after talking things through with all the relevant people, for instance the rest of the family and medical professionals, using her own close knowledge of her father and also after trying to establish her father's views and feelings.

Court appointed deputies

The Bill also creates a system of court-appointed deputies to replace and extend the current system of receiverships in the Court of Protection. As with LPAs, deputies will be able to take decisions on welfare (including healthcare) decisions as well as financial matters. A deputy could be appointed by the Court where someone has not made, or has never been able to make, an LPA. We envisage that appointments are most likely to be made to deal with financial matters in a similar way to the appointment of receivers at present. For example Femi, who lost capacity very suddenly due to a head injury sustained in a car crash, could have a deputy appointed by the court to help him manage the large sum of compensation he received after the accident. There may also be situations where someone would like to apply to the Court to become a deputy in order to gain recognised authority to make welfare decisions.

The Court will have to consider whether the person has capacity to make their own decisions and will only appoint a deputy for those matters where the person lacks capacity. The deputy will have to act according to the Court order and if the person regains capacity for particular decisions the deputy will lose his authority to make those decisions. The principle of considering the best interests of the person concerned will govern both the Court appointment of the deputy and the on-going role of deputy.

Single Orders of the Court

It may be the case that on-going formal decision making powers are never necessary to provide care for a person who lacks capacity but one particularly difficult decision arises whereby a formal decision is necessary. This could be, for example, authorising the closure of a National Savings Bank Account or deciding a difficult issue with regard to contact where family relationships

have broken down. There may also be times when people cannot agree best interests and they have been through informal ways of seeking to agree this but as a last resort the dispute will require a Court hearing to resolve.

In these cases it will be possible to apply for permission to go to the court for a single order enabling the particular decision in question to be resolved. To gain permission it will be necessary to demonstrate that the order from the court will benefit the person who lacks capacity and that it is not possible to resolve the matter without going to court.

Advance Decisions to Refuse Treatment

Making Decisions did not include proposals on advance decisions to refuse treatment. However, case law and practice on such advance decisions has developed since 1999 and the use of advance decisions to refuse treatment is now significantly clearer than it was a few years ago. In the interests of clarifying the status of advance decisions to refuse treatment, the Bill now includes them within the comprehensive decision making framework. They are one of the decision making mechanisms that may be chosen by people who wish to plan for a future loss of capacity and who wish to make clear what treatments they would not wish to receive.

The Bill seeks to codify the current common law position on advance decisions to refuse treatment while at the same time increasing the safeguards attached to them. The Bill sets out that an advance decision must be made while the person has capacity, it must not have been withdrawn or altered and it must be shown to be both 'valid' at the time when the decision needs to be taken and 'applicable' to the actual situation. To be valid the person must not have acted in a way since the advance decision was made that clearly demonstrates that his views are now inconsistent with that of that advance decision. To be applicable there must be no circumstances at the time the decision is to be applied that would have caused the person to make a different advance decision if he had been able to foresee those circumstances.

Other forms of advance statements that are not related to refusing treatment, for example an expression of choice with regard to where to live, are not dealt with explicitly in the Bill. Rather, these forms of advance statement will form part of the person's 'wishes and feelings' and so would have to be considered under the best interests principle in every decision that was taken on behalf of a person who lacked capacity. This follows current good practice. Alternatively it will be possible to use a LPA and give explicit directions to an attorney.

The Judicial and Administrative Bodies

The New Court of Protection

The current Court of Protection has jurisdiction in respect of financial decision-making on behalf of adults who lack mental capacity. Other decisions relating to adults who lack capacity, mostly serious healthcare cases, are dealt with under the inherent jurisdiction of the High Court.

The draft Bill proposes both to merge and to extend these two current jurisdictions. It will create a new dedicated Court of Protection that will have authority over all areas of decision-making for adults who lack capacity. By creating a specialised Court, it will be possible to build and maintain expertise in matters relating to adults who lack capacity. The new Court will have a regional presence, which will be served by a centralised administration office and registry.

The new jurisdiction will be responsible for clarifying all issues covered by the draft Bill. It will be a superior court of record able to establish precedent and it will have the power to remove attorneys and deputies who have acted improperly. It will also be the option of last resort in cases of dispute, for example if there is disagreement between relevant parties as to the best interests of a person lacking capacity which cannot be resolved in any other way.

The intention is that for most cases the court will be informal and non-technical and many issues will be able to be dealt with by correspondence. Where there is a hearing parties will be able to present their own cases as in the current Court of Protection.

The New Public Guardian

The new statutory framework will be supported by a Public Guardian who will have a number of functions. The Public Guardian will be the registering authority for Lasting Powers of Attorney and deputies, he or she will supervise attorneys and deputies and provide information to help the Court in its decisions. The Public Guardian will also offer advice to the public on matters to do with adults who lack capacity. He or she will be supported in the role by a team of specialised staff.

We envisage that the Public Guardian will work with other organisations who are involved in the care and wellbeing of adults who lack capacity in order to provide a complete approach to problems and possible abuse. The Public Guardian will also work with attorneys and deputies who may need help and support in carrying out their duties.

Criminal Offences

The draft Bill proposes the creation of a new criminal offence where an attorney or deputy or someone who has care of a person who lacks capacity, ill-treats or wilfully neglects that person who lacks capacity. This offence has been introduced as a further safeguard to ensure that vulnerable adults who lack capacity are not abused. It demonstrates the importance we place on the care of those who lack capacity.

There will also be an offence of concealing or destroying an advance decision to refuse treatment. This is important because, unlike LPAs, advance decisions will not have to be registered. Non-registration allows for advance decisions to be made orally and for them to be made shortly before their intended effect. This offence will ensure that a valid and applicable advance decision is respected rather than hidden away.

Matters still to be included in the draft Mental Incapacity Bill

Constitutional Changes

The draft Bill has been prepared ahead of forthcoming consultation and legislation to make changes to the role of the Lord Chancellor. On that basis the draft Bill currently contains references to the Lord Chancellor which will be reconsidered in light of other legislative changes or proposals.

Hague Convention of the International Protection of Adults 2000

The Hague Convention on the International Protection of Adults 2000 provides international protection for adults who are not able to protect their own interests. The Convention highlights international co-operation in these cases and aims to avoid conflict between different member states' legal systems.

Scotland incorporated the Hague Convention into its Adults with Incapacity Act. The intention is that the Mental Incapacity Bill will do the same. The provisions to enable this will be incorporated into the Bill prior to introduction into Parliament.

Consequential provisions

Issues affecting persons who lack capacity potentially affect every decision and action that an adult can make. Therefore, the scope of the Mental Incapacity Bill is potentially very wide. The intention is that the key principles of assessing capacity and best interests should apply wherever there is a decision to be taken about a person who may lack capacity. The Department for Constitutional Affairs is still working with other Government Departments to establish the effect of the Mental Incapacity Bill where other legal mechanisms are already in place to make decisions for those who lack capacity. For example, this affects matters such as a person losing a professional status or qualification when he or she becomes incapable; or claiming benefits or services when a person is unable to claim them for himself or herself. Consequential amendments arising from this work across Government will be included in the Bill for introduction into Parliament.

How to get more information

The draft Bill will be subject to pre-legislative scrutiny by Parliament. This means that a Joint Committee of Members of the House of Commons and Lords will look at the Bill and consider evidence and further information on the proposed policy. The Committee will be aware of the results of earlier extensive consultation carried out by the Lord Chancellor's Department and the Law Commission. The Committee then intend to submit a report to the Government later this year.

The membership of the Committee has not been settled yet, but comments on the draft Bill can be sent to:

Scrutiny Unit, Committee Office
House of Commons, London SW1A 0AA
or by e-mail to: **scrutiny@parliament.uk**

Once it has been established the committee will let people know the deadline for receiving comments.

Copies of the Bill and related papers can be obtained from:

either: TSO (The Stationery Office)
PO Box 29, Norwich NR3 1GN
Telephone: 0870 600 5522
Online: **www.tso.co.uk/bookshop**

or: The Department for Constitutional Affairs website at:
www.lcd.gov.uk/family/mi

The DCA site contains copies of:

- the draft Bill, Commentary and explanatory notes;
- a Welsh translation of the Outline of the Bill (which explains what the legislation hopes to achieve);
- an easy read translation of the Outline of the Bill (for people with a learning disability); and
- other related papers, such as *Making Decisions*.

Further contacts

You can contact the Mental Incapacity Division of the Department for Constitutional Affairs at 4th Floor, Selborne House, 54-60 Victoria Street, London SW1E 6QW, or by e-mail at: makingdecisions@lcd.gsi.gov.uk

For information about the Mental Health Bill, you can visit the Department of Health website at: **www.doh.gov.uk** or phone: **0207 210 4850**.

For information about the Public Guardianship Office (PGO), you can visit their website at: **www.guardianship.gov.uk** or phone: **0845 330 2900**.

Explanatory Notes

THE EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the draft Mental Incapacity Bill as published on 27 June 2003. They have been prepared by the Department for Constitutional Affairs in order to assist the reader of the draft Bill and to help inform debate on it. They do not form part of the draft Bill.
2. The notes need to be read in conjunction with the draft Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. In October 1999 the Government published a Policy Statement, *Making Decisions*, on proposals to reform the law in order to improve and clarify the decision-making process for those who are unable to make decisions for themselves. The Policy Statement stemmed from the Consultation Paper, *Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults*, which was published in December 1997. Both *Who Decides?* and *Making Decisions* have as their basis the recommendations made in the Law Commission Report No.231 on Mental Incapacity which was published in February 1995 after extensive consultation.
4. The draft Mental Incapacity Bill will clarify a number of legal uncertainties and fill in some gaps in the law in circumstances where decisions are made on behalf of others. The Bill will govern decision-making on behalf of both adults who lose mental capacity at some point in their lives, for example those suffering dementia or victims of a brain injury, and those whose lack of capacity has been present since birth. The draft Bill will also provide recourse, where necessary and at the appropriate level, to a court with power to deal with all personal welfare (including health care) and financial decisions on behalf of adults lacking capacity.

THE BILL

5. The provisions of the draft Mental Incapacity Bill will replace Part 7 of the Mental Health Act 1983 and the Enduring Powers of Attorney Act 1985.
6. The draft Mental Incapacity Bill is in three parts. Part 1 contains provisions defining “persons who lack capacity”, setting out a checklist to be used in ascertaining their best interests and establishing a statutory “general authority” to act reasonably when caring for them. Part 1 also establishes a new statutory scheme for powers of attorney which can extend to personal welfare (including health care) matters and which survive the incapacity of the donor – “lasting powers of attorney” (LPAs). Part 1 also sets out the jurisdiction of the court to make declarations, orders and directions in relation to

persons who lack capacity, and provides that the court may also appoint substitute decision-makers, “deputies”, for them. Part 1 sets out rules about advance decisions to refuse medical treatment. Finally, it contains miscellaneous provisions about Codes of Practice, offences etc.

7. Part 2 of the Bill deals with a new superior court of record, to be known as the Court of Protection, and with its judges and procedures. It also establishes a new statutory official, the Public Guardian, to support the work of the court.
8. Part 3 of the Bill deals with final and technical provisions.
9. It is important to note that the Bill is not concerned in any way with the compulsory detention or treatment of people suffering from mental disorder (excluded by clause 27). Its main purpose is to clarify and reform obscure common law provisions which govern the ways in which people can and should deal with people who lack decision-making capacity, supplemented by new and reformed statutory schemes for advance decision-making and court-based resolution of disputes or difficulties.

COMPATIBILITY WITH ECHR

10. Convention issues arise in relation to a number of provisions in the draft Mental Incapacity Bill, which also meets the state’s positive obligation under Article 8 to ensure respect for private life.
11. Article 8 issues in relation to bodily integrity are engaged in connection with clause 6, clause 7 and clause 10. Any interference is justified to pursue the legitimate aim of protecting the health of the person lacking capacity. Clear criteria for incapacity (clauses 1 and 2) and the clear statutory checklist as to best interests (clause 4) create a framework within which any interference can be proportionate to this legitimate aim. Article 8 rights may also be engaged by clause 39(4), allowing the court to direct a medical examination of the person concerned. Again, any interference is justifiable for the protection of that person’s own health and can be proportionate to that aim since the court is bound by the best interests checklist.
12. Rights under Article 1 of the 1st Protocol may be engaged in connection with clause 6(2) and (3) and clause 11. The statutory rules are clear and precise and strike a fair balance between the property interests of the person lacking capacity, his own wider welfare interests and the interests of others (persons supplying necessary goods and services to the person lacking capacity, anyone bearing the cost, and, in clause 11, persons related to or connected with him).
13. Clause 9(2) prohibits a bankrupt person from acting as a donee of a lasting power of attorney where the power covers property and affairs. Article 8 and Article 14 rights could be engaged but the difference of treatment has the legitimate aim of protecting an incapacitated donor from the possibility of

financial abuse, and is proportionate to that end.

14. A donee of an LPA and a court-appointed deputy can be given power to refuse life-sustaining treatment. The patient's Article 2 and Article 3 rights could be engaged. A person can also make an advance decision to refuse treatment, including life-sustaining treatment. Clause 7(3) and clause 25(5) provide that emergency action can be taken to preserve life or prevent serious deterioration in a person's condition while the court resolves any dispute or difficulty. These provisions ensure protection for Article 2 and Article 3 rights, while also discharging the obligation to respect the Article 8 rights of those who choose to give powers to a donee under an LPA, or make an advance refusal.
15. The comprehensive jurisdiction of the new Court of Protection (clauses 14-22 and, 25(4)) ensures protection for any Article 6 rights engaged in connection with the provisions of the Bill. The Government is satisfied that clause 40 (certain applicants to require permission to apply) and clause 44 (court fees) do not interfere with Article 6 rights.

TERRITORIAL APPLICATION

16. The draft Bill applies to England and Wales. Similar legislation has already been passed in Scotland in the form of the Adults with Incapacity (Scotland) Act 2000.

COMMENTARY ON CLAUSES

PART 1

PERSONS WHO LACK CAPACITY

Preliminary

Clause 1: Persons who lack capacity

17. *Clause 1* sets out the Bill's definition of a person who lacks capacity. It focuses on the particular time when a particular decision has to be made, not on the person's ability to make decisions generally. It follows that a person can lack capacity for the purposes of the Bill even if the loss of capacity is temporary or if his capacity fluctuates.
18. The inability to make a decision must be caused by an impairment of or disturbance in the functioning of the mind or brain. This could cover a range of problems, such as psychiatric illness, learning disability, dementia, brain damage or even a toxic confusional state, as long as it has the necessary effect on the functioning of the mind or brain, which causes the person to be unable to make a decision.

Clause 2: Inability to make decisions

19. *Clause 2* sets out the test for assessing whether a person is "unable to make a decision" and therefore lacks capacity. It is a "functional" test, looking at the decision-making process itself. There are four reasons why a person may be unable to make a decision. The first three (*subsections (1)(a) to (c)*) will cover the vast majority of cases. To make a decision a person must first comprehend the information relevant to the decision (further defined in *subsection (5)*), secondly retain this information (even for a short period as explained in *subsection (4)*) and thirdly weigh it in the balance to arrive at a choice. If the person cannot undertake one of these three parts of the decision-making process then they are unable to make the decision.
20. *Subsection (1)(d)* provides for the fourth situation where someone is unable to make a decision because they cannot communicate it in any way. This is intended to be a residual category and will only affect a small group of persons, in particular some of those with the very rare condition of "locked-in syndrome". It seems likely that people suffering from this condition can in fact still understand, retain and use information so would not be regarded as lacking capacity under *subsection (1)(a) to (c)*. Some of these people can communicate by blinking an eye, but it seems that others cannot communicate at all. *Subsection (1)(d)* treats those who are unable to communicate their decision as unable to make a decision. Any residual ability to communicate (such as blinking an eye to indicate "yes" or "no" in answer to a question) would exclude a person from this way of establishing that a person lacks capacity to make a decision.

21. *Subsection (2)* is based on the principle that a person with capacity is fully entitled to make decisions that would not objectively be in his own best interests. Therefore making an “unwise” decision is not evidence of an inability to make the decision. The Bill’s test of incapacity is not an “outcome” test.
22. *Subsection (3)* ensures that an assessment of lack of capacity can only be made after efforts to help the person make his own decision have failed. “All practicable steps” must be taken to help the person make a decision. Examples of the steps could include explaining the information relevant to the decision in a clear and simple way, taking the person into an environment where they are more relaxed or finding someone the person trusts to explain the information to him. The steps that ought to be taken will vary according to the situation and this is an area a Code of Practice will cover.

Clause 3: Presumption against lack of capacity

23. *Clause 3* states that the starting point for assessing capacity is always the assumption that the person does have capacity. In legal proceedings, the burden of proof will fall on the person asserting that capacity is lacking and questions as to capacity will be decided on the balance of probabilities.

Clause 4: Best interests

24. *Clause 4* establishes a statutory requirement that all steps and decisions taken for someone who lacks capacity must be taken in the person’s best interests. The best interests principle is an essential aspect of the draft Bill and builds on the common law while offering more precise guidance. All decision-makers with authority under the Bill will have to work through the checklist of factors in this clause each time they make a decision for someone who lacks capacity.
25. First, the decision-maker must consider whether the individual in question is likely to have capacity at some future date. It is important to consider whether the decision can be put off until the person can make it himself. Even if the decision cannot be put off the decision is likely to be influenced by whether the person will always lack capacity or is likely to regain capacity.
26. Secondly, the person should be involved with the decision as far as possible. The fact that the person lacks capacity does not mean he can be cut out of the decision-making process. The person concerned is always the most important and should be included in every decision made on his behalf.
27. Thirdly, regard must be had to the “past and present wishes and feelings” of the person who lacks capacity. There should be consideration of the person’s life and any statements made before the loss of capacity as an indication of likely future desires. And, even if unable to decide on a matter, the person may at the time in question indicate desires about options he would particularly like or dislike.
28. Fourthly, the decision-maker should consult with others to gain views on the past and present wishes and feelings of the person and the type of

considerations that person would be likely to have in making a decision. The decision-maker should approach anyone the person has named as someone to consult, anyone who has a caring role or is interested in the welfare of the person concerned, any donee of a lasting power of attorney and any deputy appointed for the person by the court. Lasting powers of attorney and deputies appointed by the court are dealt with later in Part 1.

29. Finally, the decision taken should always be the least restrictive one available. For example, if someone has difficulty understanding how to manage money effectively, that person should not be denied access to money altogether, if he or she could manage small amounts of spending money whilst someone else undertakes the overall management of his or her finances.
30. *Subsection (3)* of this clause applies the best interests principle to situations where the person concerned may not lack capacity. A donee might be acting under a lasting power of attorney whilst the donor still has capacity. The subsection also makes clear that the obligation also applies where the person concerned does not **in fact** lack capacity but is reasonably believed to do so. There would otherwise be a lacuna in the applicability of the best interests obligation.
31. *Subsection (4)* offers appropriate protection to those who act in the reasonable belief that they are doing so in the other person's best interests. Where the court makes a decision it must of course be satisfied that its decision is indeed in the person's best interests.

Clause 5: Adults and young people

32. For the most part, the powers given in the draft Bill relate to people aged 16 and over. There is therefore a potential overlap with the wardship jurisdiction and jurisdiction under the Children Act 1989, but the Bill's jurisdiction may be more appropriate in some cases than the wardship or Children Act 1989 jurisdiction. Arrangements for transfer of cases to the most appropriate jurisdiction will be put in place under *clause 14(2)*. However, like the current Court of Protection, the court will be able to deal with property and affairs matters for those under 16 in certain circumstances (see *clause 20(3)*).

The general authority and restrictions on it

Clause 6: The general authority

33. *Clause 6* provides for a general authority to act on behalf of an adult who lacks capacity. The general authority would make lawful many day-to-day decisions that have to be made about the care and welfare of adults who lack capacity without the need for any formal powers. It aims to clarify the principle of necessity that currently exists at common law.
34. For an action to be lawful under the general authority the person who undertakes the act must reasonably believe that the person concerned lacks capacity and it must be reasonable in all the circumstances to do the act. As already explained, under *clause 4* the act must also be in the best interests of

the person concerned.

35. No one person will be the holder of the general authority. Rather, it makes lawful a range of actions taken with the aim of helping the person who lacks capacity, where the actions might otherwise appear to be unlawful for example because they involve touching the person without consent (consent has to be given with capacity for it to be effective). So, on one day the primary carer may dress the person concerned ("P"), the district nurse may give a regular injection and a worker from a voluntary organisation may take the person out on a trip. All these actions are ones which could be undertaken lawfully under the general authority.
36. *Subsections (2) and (3)* need to be read with *clause 33* (P must pay a reasonable price for necessary goods and services supplied). If a person acting under the general authority arranges for something for P which costs money then the person can promise that P will pay, use money which P has in his possession, pay himself back from P's money in his possession or consider himself owed by P. These subsections do not allow the person acting under the general authority to gain access to funds held by, for example, P's bank or building society.
37. *Subsection (4)* recognises that some people may have control over P's money or property by other routes, for example under the Social Security Regulations or by way of banking arrangements.

Clause 7: Restriction on the general authority

38. *Clause 7* sets out a number of restrictions on the general authority. First *subsection (1)* limits the use of force or restriction of liberty of movement. Only where there is substantial risk of significant harm to the person concerned will it be lawful to use or threaten to use force when P resists something, or restrict his liberty of movement.
39. *Subsection (2)* clarifies that the general authority will be 'trumped' by a decision of a donee of a lasting power of attorney or of a deputy. *Subsection (5)* clarifies that where there is a valid and applicable advance decision to refuse treatment the general authority will have no application.
40. *Subsection (3)* makes provision for cases where there is a dispute or difficulty about a decision by donee of a lasting power of attorney or deputy. A doctor might feel that the donee of the power or deputy is acting contrary to P's best interests (and therefore in breach of their duties as donee of the power or deputy). The subsection establishes that life-sustaining treatment can be given pending a ruling from the court.

Lasting powers of attorney

Clause 8: Lasting powers of attorney

41. *Subsection (1)* defines lasting powers of attorney (LPAs). An LPA is a power which an individual (the donor) confers on another individual or individuals

(donees) which authorises them to make decisions on the donor's behalf in certain areas. These areas are the donor's personal welfare, his property and affairs or specified matters concerning those areas. Power to make decisions, includes, by virtue of *clause 50(2)*, acting on decisions made where appropriate.

- 42. *Subsection (1)* also makes clear that to be an LPA this authority must include authority to make decisions when the donor no longer has capacity to make those decisions himself. An LPA can, in certain circumstances, operate as an 'ordinary' power of attorney when the donor has full mental capacity but will also continue to operate after the donor has lost capacity.
- 43. *Subsection (2)* deals with the creation of an LPA. To create an LPA the donor must be aged 18 or over and have mental capacity. The provisions outlined in *clause 9* (as described below) in relation to donees of LPAs and Schedule 1 must also be complied with.
- 44. *Subsection (3)* states that any document which does not comply with the provisions of *clauses 8 and 9* of and Schedule 1 to the Bill confers no authority on the donee. Consequently the document created would not be a valid LPA and could not be lawfully used to make decisions on behalf of the donor.
- 45. *Subsection (4)* places restrictions on the authority that is given by an LPA. The authority is subject to the provisions in Part 1 of the Bill, particularly the requirement in *clause 4* that all things done and decisions made on behalf of a person lacking capacity must be done in their best interests. The authority is also subject to any conditions or restrictions that the donor may choose to put in the LPA document itself.

Clause 9: Appointment of donees

- 46. This clause sets out certain requirements relating to donees and how they should act. A donee must be aged 18 or over. If the LPA delegates power in relation to property and affairs only, the donee can either be an individual, or a trust corporation. (Trust corporation is defined in the Trustee Act 1925, s.68(1), and the definition includes the Public Trustee.)
- 47. *Subsection (2)* states that an individual who is bankrupt cannot be appointed as the donee of an LPA relating to property and affairs.
- 48. *Subsection (3)* provides that a donor of an LPA can appoint more than one person to act as donee. Where two or more people are appointed, they may be appointed either to act jointly (so that they must all join together in any decision) *or* to act jointly and severally (which means they can act independently or all together).
- 49. Under *subsection (4)* if an LPA appoints more than one person as donee but does not say whether they are to act jointly or jointly and severally as explained above, then it will be assumed that they will be acting jointly. *Subsection (5)* provides that *subsections (6) and (7)* apply to a situation where

two or more donees have been appointed to act.

50. *Subsection (6)* makes it clear that where multiple donees are to act jointly, if one donee has not reached the age of 18, is a bankrupt where the LPA relates to property and affairs or fails to comply with the registration requirements in Part 1 or 2 of Schedule 1 then no valid LPA will be created. *Subsection (7)* goes on to say that if donees are acting jointly and severally and one donee has not reached 18, is a bankrupt, or fails to comply with the registration requirements, then only his appointment as donee will not take effect. A valid LPA is still created in respect of the other donee(s).
51. *Subsection (8)* provides that an instrument which creates an LPA cannot give a donee or donees authority to appoint a substitute or successor donee. However, the donor can use the instrument to provide for the replacement of the donee(s) in certain specified events. These events are the donee renouncing his appointment, the donee's death, bankruptcy or winding-up or dissolution in the case of a donee who is a trust corporation or the dissolution or annulment of a marriage between the donor and the donee.

Clause 10: Scope of LPAs: personal welfare

52. This clause sets out how personal welfare LPAs can be used and how their use may be restricted in some circumstances. *Subsection (1)* states that an LPA does not allow the donee or donees to use or threaten to use force in order to do something to which the donor objects. Additionally, the LPA cannot be used to restrict the liberty of movement of the donor whether or not he resists.
53. However, *subsection (2)* provides that these acts are permitted when the donor lacks capacity, or the donee reasonably believes that he lacks capacity in relation to the particular act, and the donee reasonably believes that it is necessary to do that particular act in order to avoid a substantial risk of the donor being significantly harmed.
54. *Subsection (3)* provides that where an LPA enables decisions to be made about a donor's personal welfare, a donee will be able to give or refuse consent to treatment being given or continued to be given by a person who is providing health care for the donor. Therefore a personal welfare LPA authorises the donee to make health care decisions. This is subject to any restrictions that the donor includes in the LPA document.
55. *Subsection (4)* qualifies subsection (3) by providing that the authority from the personal welfare LPA does not allow a donee to give or refuse such consent unless the donor lacks capacity to give or refuse consent. Therefore a donee will not be able to use an LPA to make health care decisions on behalf of a donor until the donor is unable to give or refuse consent for himself. The subsection goes on to say that the authority will not allow a donee to refuse consent to life-sustaining treatment unless the LPA expressly gives such authority. This subsection is subject to *clauses 23 to 25* concerning advance decisions to refuse treatment which may exist at the same time as a personal welfare LPA. Clause 24 sets out whether the LPA or the advance decision

takes precedence.

Clause 11: Scope of LPAs: gifts

56. *Subsections (1), (2) and (3) deal with the donee's powers to make gifts from the property and estate of the donor. The donee would only be permitted to make gifts to people related or connected to the donor (including the donee) on "customary occasions". These occasions are an anniversary of a birth or marriage or on any other occasion when presents are usually given among families, friends or associates. The donee can also donate to charities which the donor is known to have supported or would be expected to support. All these gifts are only permitted if the value of each gift is reasonable in all the circumstances and particularly when viewed against the size of the donor's estate. The making of gifts is also subject to any conditions or restrictions in the LPA itself.*

Clause 12: Revocation of LPAs

57. *Clause 12 deals with the cancellation or withdrawal of LPAs. Subsection (1) outlines the types of cases to which this clause would be relevant - that is, where an individual has drawn up a document (an "instrument") which he intends to be registered as an LPA in due course, and also where an LPA has already been registered with the Public Guardian. Subsection (2) provides that the instrument and the LPA can be revoked at any time by the donor while he has capacity to do so.*
58. *Subsection (3) provides that in the event of the donor becoming bankrupt, this will automatically revoke the LPA if it relates to the donor's property and affairs. LPAs or parts of LPAs giving authority to make personal welfare decisions would not be revoked.*
59. *Subsections (4) and (5) list the events that will terminate a donee's appointment and will automatically revoke the LPA (except where subsections (6), (7) or (8) apply - see below). These events are a donee giving up his appointment by disclaiming it, the donee's death, bankruptcy or, in the case of a donee who is a trust corporation, its winding-up or dissolution, the dissolution or annulment of a marriage between the donee and the donor or the donee lacking capacity to undertake his duties as an attorney.*
60. *Subsection (6) provides for situations where an LPA continues even where a donee's appointment is revoked because of the events listed in subsection (5). This occurs where the LPA instrument appoints someone to replace the donee, or where there is more than one donee and they are acting jointly and severally and there is still at least one donee in existence. Subsection (7) provides that the bankruptcy of a donee does not terminate his appointment or revoke the power so far as his authority relates to the donor's personal welfare. Subsection (8) provides that the dissolution or annulment of a marriage between the donor and the donee does not terminate the appointment or revoke the power if the LPA provides that it is not to do so.*

Clause 13: Protection of donee and others if no power created or power revoked

61. *Subsection (1)* outlines the situations to which *subsections (2) and (3)* of this clause apply. It gives protection to donees and others who rely on registered LPAs which later turn out to be invalid. This protection applies whether or not the registration had been cancelled.
62. *Subsection (2)* provides that a donee who acts under the LPA will be protected from liability (to the donor or any other person) provided that, at the time of acting, he did not know that the LPA was not validly created and was not aware of something happening which would have terminated his authority to act as donee had a valid LPA been created.
63. *Subsection (3)* provides that any transaction entered into between the donee and any other person will be as valid as if the power had existed unless, at the time of the transaction, the donee knew that the power was not valid or that the donee's authority would have been terminated had a valid power been created. *Subsections (4) and (5)* deal with property. Where the interest of a purchaser depends upon the validity of the transaction between the donee and the other person, there will be a presumption in favour of the purchaser that the transaction is valid if:
- the transaction was completed within 12 months of the date on which the LPA was registered: or
 - the other person makes a statutory declaration, before or within 3 months after the purchase, that at the time of the transaction he or she had no reason to doubt that the donee had authority to dispose of the property.
64. *Subsection (5)* provides that where an LPA relates to matters other than property and affairs, section 5 of the Powers of Attorney Act 1971 will have effect. Section 5 of the 1971 Act gives protection where a power is revoked. References to revocation in that section also encompass situations where the power in relation to property and affairs ceases to be valid.

General powers of the court and appointment of deputies

Clause 14: Meaning of “the court”

65. This clause establishes that any reference to “the court” made in the draft Bill is a reference to the new Court of Protection as described in Part 2 of the Bill. There will be a new single court with jurisdiction to deal with all areas of decision-making for persons who lack capacity. The Lord Chancellor will be given powers to provide for the transfer of proceedings in respect of a child (that is a person under the age of 18) between the new Court of Protection, which will have the power to make decisions under this legislation, and a court with powers under the Children Act 1989. If the child has a disability which will continue into adulthood (for example, brain damage from a car accident) then it may be more appropriate for the Court of Protection to deal with a particular dispute about residence or contact. Orders made under the Children

Act 1989 all expire on a child's 18th birthday at the latest.

Clause 15: Power to make declarations

66. This clause gives the court power to make declarations, if necessary, about whether an individual has capacity, both in relation to a specific decision that needs to be made, or in relation to decisions on such matters as are described in the declaration. It also gives the court power to make declarations about whether an act or proposed act was or would be lawful. The Court of Protection would have this latter power as a superior court of record which under *clause 37(1)* has the same powers, rights, privileges and authority as the High Court, but it is considered helpful to spell this out.

Clause 16: Powers to make decisions and appoint deputies: general

67. This clause sets out the core jurisdiction of the court, which is to make substitute decisions about personal welfare or property and affairs for persons lacking capacity, or to appoint a deputy to do so.
68. *Subsection (3)* provides that the best interests principle and the checklist will govern the court's exercise of its powers.
69. *Subsection (4)* adds two extra factors to the best interests checklist, further clarifying that intervention should be limited to the minimum possible. First, a decision of the court is preferable to the appointment of a deputy and secondly, if a deputy is appointed, the appointment should be as limited in scope and duration as possible. Many people who lack capacity to make some decisions do have capacity to take many other day to day decisions and may only need help in relation to a limited range of matters. *Subsection (6)* clarifies that the court has the power to make an order on such terms as it considers is in the person's best interests, even if no-one has applied for an order in those terms.

Clause 17: Personal welfare

70. The powers created by *clause 16* in relation to making orders and appointing deputies will extend to a wide-range of personal welfare issues. Particular mention is made here of issues which have arisen in the past and been dealt with by the High Court in the exercise of its inherent jurisdiction and may be most likely to arise in future. This is not an exhaustive, merely an indicative, list.
71. However, although the court's powers extend to the above issues, the court will not be able to give all these powers to deputies. *Clause 20* lists the restrictions on deputies.

Clause 18: Property and affairs

72. *Subsection (1)* indicates the extent of the court's powers with regard to property and affairs. Again it provides a non-exhaustive, indicative list of the matters within the powers relating to property and affairs. This largely reproduces the list which applies to the current Court of Protection in Part 7 of the Mental Health Act 1983. Again, not all of the powers can be given to

deputies (see *clause 20*).

Clause 19: Appointment of deputies

73. This clause deals generally with deputies appointed by the court. The general rule is that a deputy must be at least 18 years of age, and if a trust corporation is appointed deputy it can only be in respect of property and affairs. The court may also appoint the holder of a specified office as deputy. Before any person is appointed deputy he or she must consent to being appointed. The court will be able to appoint more than one deputy to act on behalf of an individual who lacks capacity and these deputies can either act jointly or jointly and severally. That is, the court can specify either that they must all act together or that each can act independently of the other.
74. When appointing a deputy, the court will have the power to also appoint a successor or successors to the original appointees. The court will specify the circumstances under which this could occur. This clause also provides that a deputy will be treated as an agent of the adult who lacks capacity. All deputies will be able to claim reasonable expenses from the estate of the adult lacking capacity and if the court directs, the deputy can be paid for his services from the estate. The court will be able to give a deputy the power to deal with all matters concerning the control and management of any property belonging to the adult lacking capacity, including being able to invest. The court will also be able to require a deputy to give the Public Guardian security against misbehaviour (that is, either a deposit of money or a guarantee bond) and to direct the deputy to file with the Public Guardian reports and accounts as it sees fit. These provisions are broadly in line with current arrangements in the Court of Protection (Mental Health Act 1983, Part 7).

Clause 20: Restrictions on deputies

75. *Subsection (1)* provides that a deputy will not be able to act if he reasonably believes that the person concerned has capacity to make a decision himself in relation to the matter in question. In some cases P may have fluctuating capacity, for example as a result of mental health problems, and it is not acceptable for a deputy to carry on making substitute decisions when P has in fact recovered. Either P or the deputy should seek a variation or discharge of the order of appointment. The powers to prohibit a person from having contact with the adult lacking capacity or to direct a person responsible for the health care of the person lacking capacity to allow a different person to take over the health care are obviously powers which have to be exercised by the court itself. As under the current law, deputies will also be restricted from making certain financial decisions in connection with wills and trusts. Finally, a deputy will not have the power to make a decision that is inconsistent with a decision made within the scope of his authority by the donee of a lasting power of attorney.

Powers of the court in relation to lasting powers of attorney

Clause 21: Powers of court in relation to validity of LPAs

76. Both this clause and *clause 22* will be applicable for circumstances where a person has drawn up a document which he or she intends to be registered as an LPA at some time in the future, or has already been registered as an LPA. *Subsection (2)* gives the court powers to decide any question relating to whether the requirements for the creation of an LPA have been met and whether the power has been revoked or otherwise come to an end.
77. *Subsections (3) and (4)* stipulate that the court will be able to direct that a document should not be registered, or where it has been registered and the donor lacks capacity, that it should be revoked if satisfied that any of the following have taken place:
- that fraud, or undue pressure was placed on the donor to make an LPA whether it was registered or not; or
 - the donee, or intended donee, has behaved in a way that contravenes his authority or is not in the donor's best interests; or
 - the donee has shown that he intends to act in such a way
78. Where there is more than one donee this clause and *clause 22* will apply to each of the donees separately.

Clause 22: Powers of court in relation to operation of LPAs

79. The court has powers to decide any questions about the "meaning or effect" of an LPA. *Subsection (2)* provides that the court will be able to give directions with respect to decisions which the donee of an LPA has authority to make and give any consent or authorisation which the donor might have given had he or she not lacked capacity. But it should be noted that the power of the court to direct or control a donee would only arise on the incapacity of the donor.
80. The powers of the court would also extend to giving directions to the donees where the donor lacks capacity in relation to the production of information, reports, accounts and records, determining a donee's remuneration and expenses and relieving a donee from some or all of the liabilities arising from a breach of duty. The court will also have the power to authorise the making of gifts outside the scope of what is permitted by *clause 11(2)*.

Advance decisions to refuse treatment

Clause 23: Advance decisions to refuse treatment: general

81. *Clause 23* deals with advance decisions to refuse treatment. Such advance decisions are frequently made and their effect has been analysed in a number of case-law decisions. Broadly, the clauses seek to codify and clarify the common law rules which have become established law. Many general forms

of advance statement will be relevant as the “past wishes of P” mentioned in the best interests checklist in *clause 4*. An advance refusal of consent to treatment is a special type of advance statement that represents an actual decision made by P, albeit at an earlier date, and will therefore be decisive in certain circumstances.

82. The key aspects of an advance decision to refuse treatment are set out in *subsection (1)*. It must be made by a person who is 18 or over and at a time when the person has capacity to make it. The advance decision will need to specify the treatment that is refused, although this can be in non-technical terms, and may specify the circumstances in which the refusal will apply. Whilst the person has capacity it is possible to change or completely withdraw the advance decision (*subsection (3)*).

Clause 24: Validity and applicability of advance decisions

83. *Clause 24* introduces the two important safeguards of ‘validity’ and ‘applicability’ in relation to advance decisions to refuse treatment. To be **valid** the advance decision must not have been withdrawn, nor have been overridden by a subsequent LPA giving a donee the authority to consent, or refuse consent, to the treatment. Also, if the person has acted in a way that runs clearly contrary to the advance decision, then the advance decision is invalid. An example of an inconsistent action might be a former Jehovah’s Witness converting to Islam and marrying a Muslim man. Even if she had forgotten to destroy a written advance decision refusing blood transfusion, her actions could be taken into account in determining whether that earlier refusal remained her fixed decision.
84. An advance decision will not be **applicable** if the person actually has capacity to make the decision at the particular time. It will also not be applicable to treatments not specified in the decision or if the circumstances are not those specified in the decision. Furthermore the decision will not be applicable if the circumstances in which the person is placed are very different to those prevailing when his decision was made. For example, there may be new medications available that radically change the outlook for a particular condition and make treatment much less burdensome than was previously the case.
85. *Subsection (5)* introduces another safeguard for advance decisions in that they must expressly state that the decision applies to treatment that is necessary to sustain life if they are to be applicable to such treatment.

Clause 25: Effect of advance decisions

86. *Clause 25* sets out the effect of advance decisions to refuse treatment. If an advance decision is both valid and applicable it takes effect as if the person is refusing consent as a person with capacity. However, if the person carrying out the treatment did not know, or did not have reasonable grounds for believing, that a valid and applicable advance decision existed, then he will not be liable for carrying out or continuing the treatment. Where the person has a reasonable belief that there is a valid and applicable advance decision

then he may withhold or withdraw treatment without liability.

87. If there is doubt or dispute about the existence, validity or applicability of an advance decision then the court can determine the issue. However, action may be taken to prevent the death of the person concerned, or a serious deterioration in his condition, whilst a ruling is sought from the court.

Excluded decisions

Clause 26: Family relationships etc.

88. This clause lists decisions that can never be made on behalf of a person who lacks capacity.

Clause 27: Mental Health Act matters

89. *Clause 27* deals with the question of people who may be given psychiatric treatment pursuant to the Mental Health Act 1983. The clause ensures that the Bill does not apply to any treatment for mental disorder which is given by virtue of Part 4 of the Act. The safeguards in that Part must still be afforded to the patients to whom it applies.

Clause 28: Transplants

90. None of the provisions contained in this draft Bill will allow a decision to be made by anyone else in relation to the Human Organ Transplants Act 1989 on behalf of an adult lacking capacity.

Clause 29: Voting rights

91. This clause provides that no other person will be allowed to vote at an election for public office (e.g. general elections, local government elections etc.) on behalf of a person lacking capacity.

Miscellaneous and supplementary

Clause 30: Codes of practice

92. This clause provides for codes of practice to accompany mental incapacity legislation. Codes of practice would provide guidance to families, professionals and carers working with adults who lack capacity. Before publishing any such code the Lord Chancellor will be required to carry out a consultation exercise. The groups of people for whom codes of practice would be issued specifically are listed in *subsection (1)*. These groups include those responsible for assessing capacity, those acting under the general authority, attorneys acting under LPAs and those acting as deputies. Professionals acting on behalf of adults who lack capacity will be under an obligation to make themselves aware of the relevant code. Any codes of practice issued will be allowed to be used as evidence in court proceedings and could be taken into account by the court.

Clause 31: Ill-treatment and neglect

93. This clause creates a new offence of ill-treatment or wilful neglect of a person

lacking capacity. This offence is specifically aimed at all those acting pursuant to the Bill and is not intended as a “catch-all” offence to tackle abuse of vulnerable adults. *Subsection (1)* outlines the people to whom this clause applies, i.e. anyone responsible for the care of a person lacking capacity, donees of LPAs, and deputies appointed by the court. *Subsection (3)* outlines the penalties attached to committing an offence under this clause.

Clause 32: Concealing or destroying advance decision to refuse treatment

94. This clause provides that it would be an offence to conceal or destroy a written advance decision to refuse treatment with intent to deceive. The creation of this new offence will help ensure that the importance of advance decisions to refuse treatment is recognised and clarify the repercussions of concealing or destroying such a document. *Subsection (2)* outlines the penalties attached.

Clause 33: Payment for necessary goods and services

95. *Clause 33* deals with payment for necessary goods and services, clarifying and extending the current common law and statutory rules. *Subsection (1)* states that where necessary goods are supplied to or necessary services are provided for a person lacking capacity to contract, he or she should pay a reasonable price for them. *Subsection (2)* repeats the established legal definition of what is ‘necessary’. Thus, if the milkman carries on delivering milk and a cleaner carries on cleaning the house of someone who has a progressive dementia, they can expect to be paid. This clause relates back to *clause 6, subsections (2) and (3)*.

PART 2

THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN

The Court of Protection

Clause 34: The Court of Protection

96. *Clause 34* outlines the nature of the new Court of Protection. *Subsections (2) and (3)* establish a new superior court of record called the Court of Protection which will be able to sit anywhere in England and Wales. It is intended that the Court of Protection will have a regional presence. *Subsection (3)* stipulates that the court will have a central office as designated by the Lord Chancellor, however additional registries (being High Court district registries or county courts) may also be designated. *Subsection (5)* abolishes the current Court of Protection which is actually an office of the Supreme Court (rather than a superior court of record) and which operates as the main forum for financial decision-making on behalf of adults who lack capacity.

Clause 35: The judges of the Court of Protection

97. The Lord Chancellor or an appropriate person such as a senior judge acting on his behalf, will nominate a range of judges to exercise the jurisdiction of the Court of Protection including district and High Court judges. *Subsection (3)* gives the Lord Chancellor the power to appoint one of the

nominated judges to be designated President of the Court of Protection and another to be Vice-President of the Court of Protection. *Subsection (4)* will give the Lord Chancellor the power to appoint a judge to be Senior Judge of the Court of Protection, with special administrative powers.

Clause 36: Officers and staff of the Court of Protection

98. The intention is to amend the Courts Bill currently before Parliament if enacted to provide that the Lord Chancellor's duty to support the business of the courts would extend to the new Court of Protection. Officers and staff would be appointed to the Court of Protection. Court of Protection rules may provide for Court of Protection officials to exercise the court's jurisdiction, for example in non-contentious or interlocutory matters.

Supplementary powers

Clause 37: General powers and effect of orders etc.

99. *Subsection (1)* gives the Court of Protection the same powers as the High Court, for example in relation to witnesses, contempt and enforcement. This clause also provides for the effectiveness of orders and office copies of orders made by the new court.

Clause 38: Interim orders and directions

100. This clause allows the court to make orders even if evidence as to lack of capacity is not yet available, where there is reason for the court to believe P lacks capacity and it is in his best interests for the court to act without delay.

Clause 39: Power to call for reports

101. This clause makes provision for reports to assist the court in determining a case. Such reports can be commissioned from the Public Guardian, local authorities (local councils) or a Lord Chancellor's Visitor.

Practice and procedure

Clause 40: Applications to the Court of Protection

102. This clause provides that persons listed in *subsection (1)* can apply to the Court of Protection as of right while others can be required to obtain permission from the court. Rules of court can deal with this matter, for example providing that certain types of application will not require permission. The factors listed in *subsection (3)* are designed to ensure that any proposed application will promote P's interests, rather than causing unnecessary distress or difficulty for him.

Clause 41: Court of Protection Rules

103. The specialist jurisdiction of the new court calls for specialist rules of court, which will be made by the Lord Chancellor. *Subsection (2)* lists the different areas for which rules will be needed. As with the Civil Procedure Rules made under the Civil Procedure Act 1997, rules can be supplemented by practice directions.

Clause 42: Practice directions

104. *Subsection (1)* gives the President of the Court of Protection, with the approval of the Lord Chancellor, the power to give practice directions. *Subsection (2)* states that another person (for example, the Vice-President) will only be able to give practice directions if he or she had the approval of the President and the Lord Chancellor. *Subsection (3)* clarifies that the President of the Court of Protection will have authority to give directions which contain guidance about the law or the making of judicial decisions. Similar power for the Lord Chief Justice is included in the Courts Bill currently before Parliament.

Clause 43: Rights of appeal

105. This clause deals with the appeal rights under the new legislation and will be supplemented by rules of court. Any decision made at a lower level of the Court of Protection can be appealed to a higher level and then to the Court of Appeal. Any decision made by a higher judge of the Court of Protection can be appealed to the Court of Appeal. Rules of court may make further detailed provision as to permission to appeal, the test for a second appeal etc.

Fees and Costs

Clause 44: Fees

106. This clause deals with the setting of fees chargeable by the Court of Protection which will be by the order of the Lord Chancellor subject to negative resolution procedure. The order may set the level of the fees, any exemptions or reductions in the fees and any partial or whole remission of fees. Prior to making the order the Lord Chancellor must consult with the President, Vice-President and Senior Judge of the Court of Protection. The Lord Chancellor must take reasonably practicable steps to give out information about fees. Similar provision is made about other court fees in the Courts Bill currently before Parliament

Clause 45: Costs

107. This clause deals with the costs of Court of Protection proceedings and will be supplemented by rules of court. The court will have discretion to make costs orders including wasted costs orders against offending legal representatives. It seeks to put the new court in the same position as the ordinary civil courts.

Clause 46: Fees and costs: supplementary

108. This clause clarifies that rules can deal with the way fees and costs are to be paid and make provision for them to fall against the estate of the person concerned. It is modelled on existing provisions in the Mental Health Act 1983, Part 7.

The Public Guardian

Clause 47: The Public Guardian

109. This clause provides for a new public official, the Public Guardian, to be appointed by the Lord Chancellor.

Clause 48: Functions of the Public Guardian

110. This clause outlines the role of the Public Guardian and will be supplemented by regulations made by the Lord Chancellor

Lord Chancellor's Visitors

Clause 49: Lord Chancellor's Visitors

111. This clause concerns the panels of Lord Chancellor's Visitors currently appointed pursuant to the Mental Health Act 1983, Part 7. It deals with qualifications for Medical Visitors. Visitors may be asked to report to the Court of Protection (*clause 39(2)(a)*) or to the Public Guardian (*clause 48(1)(d)*).

PART 3

GENERAL

Clause 50: Interpretation

112. This clause defines certain terms used in the draft Bill and indicates where to find explanations of other key words and phrases used throughout the draft Bill.

Clause 51: Rules, regulations and orders

113. This clause refers to the various powers to make secondary legislation and specifies that the negative resolution procedure will apply (other than to commencement orders).

Clause 52: Existing receivers and enduring powers of attorney

114. This clause repeals Part 7 of the Mental Health Act 1983 and the whole of the Enduring Powers of Attorney Act 1985, while referring to the Schedules which deal with transitional and saving provisions.

SCHEDULES

Schedule 1

Lasting Powers of Attorney: Registration Etc.

Part 1: Execution of Instruments

115. Part 1 of the Schedule sets out the requirements with regard to the form and execution of an LPA. A document which fails to comply with the provisions of this Schedule will not generally create an LPA and consequently, will not give any powers to the donee. One of the most important requirements is that an LPA must be set out in the prescribed form, that is, as set out by regulations. The form must also contain statements by both the donor and the donee of the power to the effect that they have read (or had read to them) such information as may be prescribed. Additionally, the LPA must include statements by the donor that he or she wants the power to continue should he or she lose capacity at some future date and naming any persons whom the donor wishes to be notified of any application to register the LPA ("named persons"). The Public Guardian may treat an LPA differing in an immaterial respect from the prescribed form as sufficient to create an LPA and the court has the power to make a declaration as to the validity of an LPA where there is some doubt or confusion.

Part 2: Registration

116. The powers given in an LPA to the donee cannot be exercised until the document has been registered. In order to register an LPA an application must be made by the donor or donee(s) to the Public Guardian. The Public Guardian is required to notify the donor or donee(s) (depending on who makes the application) and any named persons. However, the court will have the power to dispense with this requirement on the application of either the donor or donee. If an objection to the LPA is received within the prescribed period the document will not be registered unless the court specifically directs it. An objection by a donor to registration by the donee(s) must be made to the Public Guardian and the court will only direct him to register the LPA if satisfied that the donor lacks capacity to object. An objection by a donee or named person on the basis that the LPA has been revoked must also be made to the Public Guardian. An objection by a donee or named person on such other grounds as may be prescribed must be made to the court. All interested parties (for example, the donor, the donee, named persons etc.) will be notified when registration takes place.

Part 3: Cancellation of Registration

117. The Public Guardian will cancel an LPA if he is satisfied that the power has been revoked on the basis of:
- the donor's bankruptcy

- the donee giving up his/her appointment by exercising a disclaimer
 - the death of the donee
 - the bankruptcy of the donee or in the case of a donee who is a trust corporation, its winding up or dissolution
 - the dissolution or annulment of a marriage between donor and donee
118. the court must direct the Public Guardian to cancel the registration of an LPA if the court:
- decides that a requirement for creating the LPA was not met;
 - decides that the power has been revoked or otherwise come to an end; or
 - revokes the power on fraud or undue pressure grounds.
119. On cancellation the Public Guardian will notify both the donor and donee of the power to this effect.

Part 4: Records of Alterations in Registered Powers

120. A note of any revocation of an LPA because of the donor or donee's bankruptcy which only takes effect in so far as the power relates to the property and affairs of the donor will be attached to the LPA by the Public Guardian. The Public Guardian must also attach a note to an instrument if an event has terminated the appointment of the donee but not revoked the instrument or the appointment of the donee has been replaced under the terms of the LPA. The Public Guardian must give the donor and donee notice of any notes attached to the LPA.

Schedule 2

Property and Affairs: Supplementary Provisions

121. Schedule 2 contains detailed provisions relating to the court's powers in relation to property and affairs, in particular the operation of wills and settlements. Paragraphs 1-4 deal with wills that can be made on behalf of an adult lacking capacity. Paragraphs 5 and 6 concern settlements of property made on behalf of an adult lacking capacity. Paragraph 7 enables the court to direct the transfer of stocks to a person appointed outside England and Wales in certain circumstances. Paragraph 8 allows those who have an interest in property that has been disposed of on behalf of an adult who lacks capacity to be able to preserve that interest. Paragraph 10 limits the power to act as a patron of a benefice on behalf of a person who lacks capacity to the Lord Chancellor only.

Schedule 3
Provisions Applying to Existing Ending Powers of Attorney

122. This Schedule has effect in relation to enduring powers of attorney created before the implementation of the Mental Incapacity Bill. It repeats, with minor amendments, the effect of the Enduring Powers of Attorney Act 1985, which is revoked.

Part 1: Enduring Powers of Attorney

123. Part 1 sets out the main elements of enduring powers of attorney (EPAs). EPAs are not revoked by any subsequent mental incapacity of the donor of the power, unlike ordinary powers of attorney. Such a power is only created if it is in the prescribed form and complies with the provisions as outlined in paragraph 2 of this Part. This Part also outlines the scope of EPAs. They can give general power to the donee in relation to the donor's property and affairs or they can give more specific powers in relation to particular elements of the donor's affairs. Both general and specific powers may be subject to conditions and restrictions as set out by the donor. A donee may from time to time make gifts from the donor's property to people connected to the donor (including himself) and to any charity the donor may have been expected to make gifts to. This is subject to any conditions or restrictions as mentioned above and also to the reasonableness of such gifts with regard to the size of the donor's estate.

Part 2: Actual or Impending Incapacity of Donor

124. This Part outlines the steps which should be taken on the actual or impending incapacity of the donor. Once the attorney believes that the donor is or is becoming mentally incapacitated he or she must immediately make an application to the Public Guardian to register the power. Part 3 deals with the steps which must be taken before the application to the Public Guardian is made. The application for registration must be made on the prescribed form and must contain the appropriate statements as prescribed by regulations. If an application is made to the Public Guardian which complies with these provisions and those outlined in Part 3, the Public Guardian will register the document.
125. In certain situations the court may direct the Public Guardian to register a document without notice having been given on specified persons as required in Part 3. Persons notified may file written objections to registration within 4 weeks of such notification. Any other person may file written objections within 5 weeks. The basis upon which objections can be made are also given. These include such grounds that fraud or undue pressure were used to persuade the donor to make the power or that the attorney is unsuitable and so on. If the court is satisfied with any objection raised the document will not be registered.

Part 3: Notification Prior to Registration

126. Part 3 sets out the steps which should be taken by the attorney before making an application to the Public Guardian to register the power. The attorney must give notice of his intention to register the power to all those entitled to receive notice. These people can include, the donor's husband or wife, the

donor's children and the donor's parents. The attorney is also under a duty to give notice of his intention to register to the donor. As mentioned previously, the attorney may apply to the court to dispense with this requirement to give notice to entitled persons. Notices should be in the prescribed form and must contain specific information, especially with regard the right of that person to object to registration.

Part 4: Legal Position after Registration

127. Once an EPA has been registered it can be revoked only by the court. A disclaimer by the attorney is not valid until the attorney has given notice of such to the Public Guardian. Furthermore, the donor cannot alter in any way the scope of the power given in the registered power. This part also outlines the role of the court with regard to registered powers. The court has a number of functions, not least the power to decide any question about the meaning or effect of an EPA. The court is also under an obligation to direct the Public Guardian to cancel the registration of a power in a number of circumstances. For example, if it is satisfied that the donor is and is likely to remain capable or if it is satisfied that undue force or pressure was put on the donor to create the power. The full list of circumstances is given in paragraph 4. This Part of the Schedule also lists the circumstances under which the Public Guardian is obliged to cancel the registration of a power, such as on receipt of a disclaimer from the attorney.

Part 5: Protection of Attorney and Third Parties

128. This Part of the Schedule provides protection for those who act under a power which is invalid as long as at the time of acting they did not know that the power was invalid or that had the EPA been valid either an event had occurred which would have revoked the power or that the power would have expired. Any transaction between an attorney and another person is valid unless that person is aware of those matters.

Part 6: Joint and Joint and Several Attorneys

129. A document which appoints more than one attorney cannot create an EPA unless the attorneys are appointed to act jointly or jointly and severally. Where attorneys are appointed to act jointly and severally, if one of them fails to comply with the necessary requirements for the creation of an EPA, then the document will not create a power in his case but this will not affect the creation of a power in relation to the other attorneys. If one or more (but not both or all) of the attorneys applies to register the document, they must notify the other attorney(s) of this. This Part of the Schedule details how the appointment of joint or joint and several attorneys will affect other provisions relating to EPAs in this Schedule.

Part 7: Interpretation

130. Part 7 of the Schedule gives information on how a number of terms should be interpreted for the purposes of the Schedule. 'Mentally incapable' or 'mental incapacity', except in relation to revocation at common law, means in relation to any person that he is incapable, by reason of mental disorder of managing and administering his property and affairs. 'Mentally capable' and 'mental

incapacity' are to be construed accordingly. The term 'notice' refers to a notice in writing.

131. Subsection (2) makes clear that any question which arises in relation to Schedule 3 as to things that the donor of a power might be expected to do is to be determined on the assumption that he had full mental capacity at the time but otherwise by reference to the circumstances which existed at that time.

Schedule 4

Transitional Provisions and Savings

Parts 1 and 2

132. Schedule 4 deals with transitional arrangements arising from the repeal of Part 7 of the Mental Health Act 1983 and repeal of the Enduring Powers of Attorney Act 1985.
133. In particular, Part 1 sets out provisions for enabling receivers appointed under the Mental Health Act 1983 to continue.

FINANCIAL AND PUBLIC SERVICE MANPOWER EFFECTS

134. The Bill will entail some additional public expenditure. There will be some implementation costs, although we do not anticipate that these will be significant. However, there will also be some additional legal aid costs (for legal help rather than legal representation). Some additional costs, to cover the necessary training of health and social care staff and alterations to relevant Department of Health guidance currently available in this area, will also be needed.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

135. For the majority of people who will be affected by these proposals, there will be no real cost implications. It is anticipated that the Bill will reflect their own good practice and should not require any significant change or new costs. The costs of compliance for small businesses are likely to be small, though we have not yet quantified these in resource terms. The majority of care and residential homes and providers of care and support, are small businesses. The view of many representatives of care home managers is that they already act in accordance with the intentions of the Bill.
136. The full text of the Partial Regulatory Impact Assessment (RIA) is set out at the end of this document. It assesses the impact in terms of costs, benefits and risks of the proposals in the draft Bill and the other options considered that

could affect businesses, charities or the voluntary sector.

PARTIAL REGULATORY IMPACT ASSESSMENT

Title

1. The Mental Incapacity Bill

Issue

2. The Mental Incapacity Bill is intended to provide better protection in law for some of the most vulnerable people in our society - those who have never had capacity, those who lose capacity suddenly and those who suffer a gradual loss in capacity. The Bill provides a comprehensive legal framework for decision making on behalf of those who lack capacity. The Government has had a commitment to legislate in this area 'when Parliamentary time allows' since 1999 and there has been extensive consultation about the issues.

Current situation

3. At present there is no comprehensive statutory framework for making decisions on personal welfare matters on behalf of those who lack capacity. There is only provision to cover decision making on property and financial issues but there is no obligation to register an "enduring power of attorney (EPA)", which allows another person to make decisions on financial matters for an adult who loses mental capacity. The cost of registering an EPA is £220 at this time.

4. Current problems include:

- many people lacking capacity are wrongly deemed incapable of *all* decision making and thus feel dis-empowered and excluded from decision making; (Around 145,000 adults in England have severe and profound learning disabilities and at least 1.2 million have a mild to moderate disability. In Wales over 12,000 people were registered as having a learning disability in 2001. It is estimated that around 670,000 people in the UK currently suffer from dementia and this is likely to increase to 840,000 by 2021);
- those who help or care for incapacitated people informally and with their best interests at heart currently have no clear protection in law for the decisions they take; (there are around 6 million carers looking after those who lack capacity);
- there are concerns that EPAs can be used without being registered and banks and other financial institutions are unclear about the status of EPAs. There is no system for monitoring unregistered EPAs; (there are some indications of abuse in the current system). A recent review suggests that approximately 4% or 2,350 cases might need a higher level of scrutiny. Master Lush (senior judge at the Court of Protection)

in 1998 estimated that financial abuse might occur in 10-15% of EPA cases that are registered with the PGO and that this figure may well be much higher in cases that are not registered);

- without a legal framework there is no effective way of taking action where abuse is suspected unless the offence is so serious as to fall within existing criminal offences;
- health and welfare professionals lack clear information about the law governing how they may take decisions – often having to exercise personal judgement in the absence of clearcut guidance in acute cases;
- it is not currently possible to plan ahead for a time of incapacity and appoint someone to take decisions on personal welfare matters on your behalf and,
- there is a lack of clarity about the legal status of living wills, advance directives and advance decisions to refuse treatment.

Objective of legislation

5. The objective of the the Bill is to reform and expand the law in order to improve and clarify the rules governing the taking of decisions in relation to those who are unable to make decisions for themselves. The legislation will apply in England and Wales.

6. The intended effects are:

- to establish key principles that should underpin all decision making and will thus better protect both those who lack capacity and those who make decisions – both informally and in a formal capacity – on behalf of them;
- to establish a comprehensive statutory framework within which decisions on financial, personal welfare matters (including healthcare) can be made in a transparent and comprehensive manner;
- to provide for "lasting powers of attorney" which will allow people to decide who they wish to make decisions on their behalf in relation to financial and personal welfare issues should they at a future time lack capacity to do so;
- to create a new superior court - the Court of Protection – to deal when necessary with matters relating to decisions made or to be made on behalf of people who lack capacity;
- to make provision for court appointed deputies, (who will be authorised to deal with a specified matter or matters), for a specified period of time, subject to review, for people who are unable to make decisions for themselves and who do not have an attorney; and

- to create a new criminal offence of ill-treating or wilfully neglecting a person who lacks capacity.

7. Four options have been identified for addressing issues

Option 1 - Do the minimum – encourage those who have or hold enduring powers of attorney to register these powers.

Option 2 – Encourage professional organisations to establish voluntary codes of practice in respect of specific areas of mental incapacity.

Option 3 - Give carers and professionals clear guidelines for when day-to-day decisions have to be made about the health, welfare, property and financial matters of mentally incapacitated adults.

Option 4 – Introduce new mental incapacity legislation.

8. We have considered the costs, benefits and risks associated with each option as far as possible at this time to make an initial assessment.

Options for addressing the issues

OPTION 1

Option 1 - Do the minimum - encourage those who have or hold enduring powers of attorney to register these.

Risk Assessment

1. The cost of the campaign would probably only result in those who are any event well intentioned taking action to register: it would not solve the problems of those who still did not register EPAs.
2. It would not significantly increase safeguards for vulnerable adults.
3. The likely public perception that the status quo was being maintained would not encourage people to plan for future incapacity, at the risk of greater costs when the court had to appoint receivers.
4. There would be an ongoing lack of a statutory framework for decisions on personal welfare issues – hence an ongoing uncertainty for professionals and families. Any disputed decision would continue to be settled by the High Court. Cases would be both time and resource intensive.
5. There would be ongoing lobbying for a better decision-making framework for persons who lack capacity: also certainty of accusations of Government not fulfilling commitments.
6. It would not increase protection for informal carers for decisions they take on behalf of mentally incapacitated adults.

Benefits

Awareness campaigns might improve the rate of registration in the short term - previous media coverage of EPAs has resulted in increased registration. An article in July 2002 resulted in an increase in registrations from 779 in July to 1185 in August. But numbers reduced to 976 in September. There are no new benefits. Approximately 10% (12,000 enduring powers of attorney) EPAs are registered annually. However, there are no lasting effects so this would not significantly change the status quo.

Compliance costs

There are no additional compliance costs for the business and voluntary sector from this option.

Other costs

None.

OPTION 2

Option 2 - encourage professional organisations to establish voluntary codes of practice in respect of specific areas of mental capacity.

Risk Assessment

1. Codes already exist in some areas – e.g. the BMA's and GMC's: new codes would not actually improve the law and would not be enforceable; there would be no guarantee that all professional organisations would introduce voluntary codes or that they would be consistent.
2. There would be ongoing lobbying for a better statutory decision-making framework for those lacking capacity; also certainty of accusations of Government not fulfilling commitments.
3. New codes would not significantly increase safeguards for vulnerable adults.
4. There would be no additional incentive to encourage people to plan for future incapacity.
5. It would not provide protection for informal carers for decisions they take on behalf of mentally incapacitated adults.
6. It would rely on the commitment of individual stakeholders.
7. Any disputed decision would continue to be settled by the court. In personal welfare cases, this would be the High Court. Cases would be both time and resource intensive and the public would remain sceptical of a profession that regulates itself.

Benefits

Whilst codes already exist for medical practitioners in respect of decision-making, new codes would need to be created, e.g. for carers or care homes. Voluntary codes and information demonstrate the Government's commitment to improving the decision-making process by encouraging the professions to adopt best practice. Additionally, if the drafting and set-up of a voluntary code was flexible enough it could be amended quickly, and stakeholders are often best placed to police compliance.

Compliance Costs

There are compliance costs to the business and voluntary sector in devising and maintaining the different voluntary codes of practice.

Other costs

The voluntary codes would need to be widely available and training on how they operated, including up-date and on the job training would be necessary for each

person involved in the care of incapacitated adults.

The codes would require self-policing and it would be necessary for some regulatory body (or bodies) to consider complaints/ concerns/ changes etc.

OPTION 3

Option 3 – Give carers and professionals clear guidelines for when day-to-day decisions have to be made about personal welfare and financial matters for mentally incapacitated adults.

Risk Assessment

1. As with option 2, option 3 would lack the statutory backing needed to tackle abuse.
2. The take up rate on information and training could not be guaranteed which might result in an uneven implementation of the guidance.
3. Guidance is not binding, so there would probably be no increase in public confidence in the decision making process.
4. It may not reduce the number of disputed cases which would fall to the courts to decide.
5. Guidance would cover the remit of a number of Government departments - it would be resource intensive to agree and continually review the guidance to ensure that it continued to meet the needs of a diverse population.
6. There would be ongoing lobbying for a better decision making framework: certainty of accusations of Government not fulfilling commitments.
7. It would not provide statutory protection for informal carers for actions they take on behalf of mentally incapacitated adults.

Benefits

Clear and thorough guidance might result in fewer disputes as long as the views of all involved were canvassed, their views taken into account and the reasons for the decision were transparent and reasoned and accepted by all involved. Guidance might encourage friends and family to participate in the decision making process of mentally incapacitated adults and ensure that health professionals give appropriate weight to their views.

Compliance Costs

There would be considerable costs in the production and dissemination of guidance, awareness and job skill training for the various areas working with people who lack or who have impaired capacity. These costs would be borne by the various partners and stakeholders, such as Department of Health, CSSRs (Councils with Social Services Responsibilities), care homes, voluntary organisations etc. This would mean considerable set up costs, to ensure that all of the different areas had harmonising guidance covering a number of Government departments and managed from some central point. There would be an ongoing burden with dedicated teams required to constantly update guidance and ensure

that the different guidance harmonised. Organisations would produce their own guidance/training packs according to the varied needs of their staff and there is capacity here for local practice/shortcuts etc to dilute the value of centralised guidance. It is not possible yet to quantify the number of people we would have to reach to raise awareness of the new legislation or the cost of this.

Producing guidance in this way would fall, in the main, to the Department of Health, at a time when the Department is seeking to reduce centrally issued guidance and devolve more responsibilities to the NHS/CSSRs. It is unlikely that possible benefits from this option would make the costs of achieving and maintaining it viable.

Other Costs

When dealing with a disputed or difficult decision, it would be necessary for a record to be made of all of the views put forward, the views taken into account and those discarded, who was consulted etc and this would give rise to additional costs for care providers. We estimate that relatively few decisions would require recording and costs should be minimal. The good practice of recording important decisions might well result in fewer disputed decisions and thus a saving of time.

OPTION 4

Option 4 – introduce new mental incapacity legislation.

Risk assessment

8. The Bill will provide a comprehensive legislative framework for making decisions for those who lack capacity. It will create a new environment in which people who lack capacity should be expected to play as full a part as possible in making decisions that affect them. It will provide statutory protection for those who care for people who lack capacity and it will provide for regulatory safeguards and ongoing monitoring and support to protect vulnerable people from abuse. Our intention is that it would in practice enshrine in statute what is current good practice in many situations without imposing undue bureaucracy.

9. There are a number of possible risks, which we intend to address as we develop the ways in which we deliver the policy:

- a possible increase in litigation (simply because there is a new Court of Protection which can deal with disputes)
- implementation would entail setting up some new working relationships between the various agencies/organisations with an interest
- carers may perceive that the Bill introduces a more burdensome decision making process rather than setting up best practice mechanisms

Benefits

10. Legislation would:

- fulfil the Government's commitment to legislate;
- enhance the Government's existing policy on protection of vulnerable adults, as set out in "No Secrets" and already being further extended under the Sexual Offences Bill, thereby supporting joined up Government;
- provide long term benefits for those agencies currently in a time and resource consuming relationship with the vulnerable people who use their services.
- provide legal clarity in all areas of decision making on behalf of adults who lack capacity;
- satisfy stakeholders that action was being taken to protect the vulnerable and those who take decisions with them or on their behalf;
- reduce abuse of vulnerable people by stipulating that lasting powers of attorney had to be registered to be used;
- provide greater empowerment for those who lack capacity by stipulating that

they should be given every opportunity to take every decision;

- provide greater clarity about who should take decisions on personal welfare issues;
- introduce a new criminal offence for ill-treatment or wilful neglect;
- encourage people to consider seriously whom they wish to take decisions on their behalf in the event of incapacity; and
- provide court protection – through the new system of deputies – for all areas of an incapacitated person’s life if they had not appointed an attorney.

Compliance Costs

11. The draft legislation would provide a new Code of Practice covering all three areas. This would affect personal welfare (including healthcare) areas in particular, as previous legislation has not covered these areas. The Code of Practice would be an overarching mechanism that provides a framework to decision-making for adults with impaired capacity and on behalf of those who lack capacity to make their own decisions. Existing guidance, for the various areas working with people who lack or who have impaired capacity may require revision, though it is anticipated this can be dealt with over a period of time and as part of a general updating of material. These costs would be borne by the various partners and stakeholders, such as Department of Health, CSSRs (Councils with Social Services Responsibilities), care homes, voluntary organisations etc.

It is not possible to quantify any additional costs as a result of the changes at this time, but preparing and producing guidance would fall mainly to the Department of Health.

At this time the Department is seeking to reduce centrally issued guidance and devolve more responsibilities to the NHS/ CSSRs. Further work is required to assess the impact at local levels.

12. Setting up or expanding mechanisms for the resolution of the majority of decisions at a local level is a key component of a process that ensures the court is used as a last resort. There has been an initial discussion with the Department of Health about the possibility of using, for instance, local Protection of Vulnerable Adults multi-disciplinary committees and we are planning to undertake, jointly, further work over the summer to consider the most effective and cost effective options for resolving disputes locally about decisions for people who lack capacity.

13. In personal welfare areas, there will be new work and we need to understand the kind of decisions that would be affected by the legislation and the numbers of decisions. We need to consider how local forums could be utilised to help people to agree the best decision where there is some doubt or dispute and estimate with some certainty any additional costs of these informal, local mechanisms, and any national savings created by avoiding costly litigation through the court.

14. Our aim is to create an open, simple customer focused mechanism that allows people to make decisions based on all available information in a transparent and inclusive way and to avoid any unnecessary bureaucracy.

15. Following completion of this, and other work, an option for implementation and in preparation for a full Regulatory Impact Assessment, we will present a report to Ministers in both DCA and DH that would identify the resource and workforce demands, together with the benefits arising from any suggested changes.

16. A programme of work to identify the mechanisms has begun and how best they can be put in place to enable a firm idea of any resource implications to be reached.

Other costs

18. The Bill would create a new superior court - the Court of Protection - to deal with disputed and complex cases. Our aim is for this new court to be a court of last resort and for it to maintain the current spirit of the existing Court of Protection by being informal and speedy when access is needed and leave has been granted. We anticipate some increase in the workload of the court's administrative arm, the Public Guardian, and this was flagged up in SR2002. We do not now, however, anticipate that implementation would be feasible before Spring 2006 at the earliest, so all costs would be a matter for the SR and implementation would be contingent on an assessment of Government priorities.

Risks and sensitivities around estimates

19. Estimating new workloads and their possible costs is extremely difficult and further work is needed to establish any impacts on business, voluntary and health and welfare sectors beyond being aware of the new framework. As implementation of legislation would take some time, we would use this opportunity to work with our many stakeholders to spread and minimise costs.

20. Publication of the draft Bill and putting it in the public domain, will mean we are able to speak to stakeholders about implementation issues and in particular the nature and volume of cases and issues that might arise were the Bill to be implemented.

Results of consultations

21. The Government's policy document *Making Decisions* was the result of wide consultation following the consultation paper *Who Decides? Making Decisions on Behalf of mentally Incapacitated Adults*. There is widespread support for the changes outlined in Option 4. In particular, healthcare professionals, legal practitioners, social care professionals and relatives, together with many voluntary organisations, support the introduction of the legislation.

Impact on Small Business

22. The cost of compliance for small businesses is likely to be small, though we have not yet been able to quantify it in resource terms. There will be costs associated with implementing the Bill for private care homes e.g. awareness raising of the Bill for health and social care staff and costs of staff time and any legal representation needed to resolve any disputes.

23. The majority of care and residential homes and providers of care and support are small businesses. We have met representatives of care home managers and they have been supportive of the legislation, which they consider builds on best practice. Their view was that many of them already act in accordance with the intentions of the Bill. The task would be to ensure that all knew the expectations of the law. The protection that would be afforded to carers was welcomed as a real benefit that would enable them to make decisions on behalf of those they care for with more confidence. Decisions could be more easily explained to relatives if expressed as in the best interests of the patient and friction would be reduced. We will continue to work with the Small Business Service to measure and to minimise any impact on small businesses and voluntary organisations.

24. There may be an impact on the voluntary sector, and their ability to deliver other services to DH/CSSRs if their involvement in representing people lacking capacity increases. However, this may well be balanced and perhaps overtaken by the saving of resources utilised at present to press for legislation, and they do, in any event, have to handle enquiries from individuals about mental incapacity issues.

Competition Assessment

25. The new framework for making decisions with/on behalf of persons who lack capacity would be relevant to everyone concerned in the care of, or dealing with, those with impaired capacity. Whilst the majority of care and residential homes, and providers of care and support, are small businesses, it is unlikely that these changes will restrict or deter new entry into the sector. Indeed, clarity about the legal position could, on the one hand reassure those who are well intentioned and considering joining the sector; and on the other hand deter those whose intentions are less positive.

26. We consider that there will be no disproportionate effects in relation to compliance costs for businesses that deal with the care of those who lack capacity. The scale of such costs is considered unlikely to be sufficient to have any significant effect on competition within the market.

Summary of cost benefits and those affected

27. For the majority of adults who lack capacity, the legislation would provide empowerment by recognising that they should be assumed to be capable of participating in making decisions that affect them. It would provide safeguards against abuse and a forum to handle suspected abuse.

28. For carers and those who deal with adults with impaired capacity, the Bill will provide protection against litigation as long as the decisions they make are reasonable and they act in the best interests of the person for whom they provide care.

29. For professional health and social care workers, the legislation will bring clarity and consistency to the decision making process. The public will consequently have more confidence in decisions made in an open, honest and transparent way.

30. For the general public, the legislation will provide a robust framework for making decisions, a forum for disputes and a new "Public Guardian" to monitor and deal with possible abuse. It will clarify the roles and responsibilities of all concerned in making the decision and emphasise and underline the role of those closest to the adult without capacity in deciding what should be done in their best interests.

Recommendation

31. Option 4 fulfils the Government's commitment to legislate to better empower and protect vulnerable people in society and those who take decisions with them or on their behalf.

32. Implementation would not be feasible before Spring 2006 at the earliest so all costs would be a matter for the next SR and would be contingent on an assessment of Government priorities.

Enforcement, sanctions, monitoring and review

33. The Bill for introduction will include provisions for evaluating the use of the Act. We will work closely with our stakeholders to ensure that we collect the information that will demonstrate the effectiveness of the legislation.

34. The legislation would not bring any additional burden for enforcement. The legislation provides a framework for making decisions. The creation of two new offences is unlikely to impact greatly, as the new offences will be used in place of the offences used at present. These new offences are unlikely to be used save in exceptional circumstances, where all other action has failed.

35. The legislation will be subject to regular post-implementation review, commencing 12 months following introduction.

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